

REMARKS

In the Office Action dated December 24, 2008, claims 1-44 were pending and under examination. Claims 1-44 stand rejected.

In response, claims 1, 3, 5-7, 11-15, 27-35 and 39-44 are amended. New claims 45-74 are added. No new matter is added.

Applicant responds to the comments in the Office Action as follows.

Claim Rejections - 35 U.S.C. §101

The Office Action states that claims 39-41 are rejected under 35 U.S.C. §101 as not reciting proper processes. Claims 39-41 are amended to be dependent upon method claim 19. Accordingly, claims 39-41 now recite processes that are proper under 35 U.S.C. §101. Applicant respectfully requests reconsideration and withdrawal of the rejection.

Claim Rejections - 35 U.S.C. §112

The Office Action states that claims 1-44 are rejected under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter that Applicant regards as the invention. In particular, the Office Action cites combinations of broad and narrow claim

language, indefinite terminology or improper Markush group language. Applicant respectfully traverses the rejection.

Claims 1, 3, 5-7, 11-15, 27-35 and 39-44 are amended to remove combinations of broad and narrow claim language, indefinite terminology or improper Markush group language. Applicant submits that claims 1-44 comply with 35 U.S.C. §112, second paragraph, and respectfully requests that the rejection be reconsidered and withdrawn.

Claim Rejections - 35 U.S.C. §102

The Office Action states that claims 1-4, 7-10, 15-16, 18, 27, 29 and 39-40 are rejected under 35 U.S.C. §102(b) as being anticipated by Kindie et al. (U.S. Pat. Pub. No. 2003/0143309, "Kindie") in view of the evidence given in Teff bv, Teff-Nutrition Data, and Eragrain Teff. In particular, the Office Action states that Kindie explicitly or inherently teaches each and every element found in the rejected claims under this section in view of the evidence offered by Teff bv, Teff-Nutrition Data, and Eragrain Teff. Applicant respectfully traverses the rejection.

Inherency of an element in a cited reference cannot be established based on supposition or possibility. "To establish inherency, the extrinsic evidence 'must make clear that the

missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.'" *In re Robertson*, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999) (citations omitted); MPEP § 2112(IV).

Instead, the Office Action must provide evidence in support of an inherent disclosure. "In relying upon the theory of inherency, the Examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art." *Ex parte Levy*, 17 USPQ2d 1461, 1464 (Bd. Pat. App. & Inter. 1990) (emphasis in original); MPEP § 2112(IV).

The Office Action states that Kindie discloses teff flour that inherently possesses falling numbers as presently claimed. However, the disclosure by Kindie merely cites the use of teff flour, without reference to the falling numbers recited in the claims. The cited reference of Teff bv simply states a typical value for a falling number for teff flour. Accordingly, the

Office Action has not demonstrated that the falling numbers recited in the claims of the present application are necessarily present in the disclosure by Kindie.

Kindie does not, therefore, inherently disclose the recited falling numbers as claimed. Because the cited references do not disclose, either explicitly or inherently, all the limitations in the claims rejected under this section, claims 1-4, 7-10, 15-16, 18, 27, 29 and 39-40 should be patentable over the disclosure by Kindie. In addition, claims 2-4, 7-10, 15-16, 18, 29 and 39-40 ultimately depend upon claim 1, and should be allowable for the same reasons claim 1 is allowable, and also because of the further limitations recited in each of the dependent claims. Applicant therefore respectfully requests that the rejection of claims 1-4, 7-10, 15-16, 18, 27, 29 and 39-40 under 35 U.S.C. §102(b) over Kindie be reconsidered and withdrawn.

The Office Action states that claims 1-4, 7-12, 15-16, 18, 27, 29 and 39-40 are rejected under 35 U.S.C. §102(b) as being anticipated by Science of Bread: Ethiopian Injera Bread ("Science of Bread"), taken in view of the evidence given in Teff bv, Union Mill, Teff-Nutrition Data and Eragrain Teff. Applicant respectfully traverses the rejection.

As discussed above with respect to the cited reference of Kindie, the Office Action has not provided sufficient support to demonstrate that Science of Bread necessarily discloses the falling numbers recited in the rejected claims. Science of Bread does not, therefore, inherently disclose the recited falling numbers as claimed. Because the cited references do not disclose, either explicitly or inherently, all the limitations in the claims rejected under this section, claims 1-4, 7-12, 15-16, 18, 27, 29 and 39-40 should be patentable over the disclosure by Science of Bread. In addition, claims 2-4, 7-12, 15-16, 18, 29 and 39-40 ultimately depend upon claim 1, and should be allowable for the same reasons claim 1 is allowable, and also because of the further limitations recited in each of the dependent claims. Applicant therefore respectfully requests that the rejection of claims 1-4, 7-12, 15-16, 18, 27, 29 and 39-40 under 35 U.S.C. §102(b) over Science of Bread be reconsidered and withdrawn.

The Office Action states that claims 1-4, 7-9, 14, 16-18, 27, 29 and 39-41 are rejected under 35 U.S.C. §102(b) as being anticipated by Celiac Recipes, taken in view of the evidence given in Teff bv, Teff-Nutrition Data and Eragrain Teff. Applicant respectfully traverses the rejection.

As discussed above with respect to the cited references of Kindie and Science of Bread, the Office Action has not provided sufficient support to demonstrate that Celiac Recipes necessarily discloses the falling numbers recited in the rejected claims. Celiac Recipes does not, therefore, inherently disclose the recited falling numbers as claimed. Because the cited references do not disclose, either explicitly or inherently, all the limitations in the claims rejected under this section, claims 1-4, 7-9, 14, 16-18, 27, 29 and 39-41 should be patentable over the disclosure by Celiac Recipes. In addition, claims 2-4, 7-9, 14, 16-18, 29 and 39-41 ultimately depend upon claim 1, and should be allowable for the same reasons claim 1 is allowable, and also because of the further limitations recited in each of the dependent claims. Applicant therefore respectfully requests that the rejection of claims 1-4, 7-9, 14, 16-18, 27, 29 and 39-41 under 35 U.S.C. §102(b) over Celiac Recipes be reconsidered and withdrawn.

Claim Rejections - 35 U.S.C. §103

The Office Action states that claims 5-6, 13, 30-32 and 42-44 are rejected under 35 U.S.C. §103(a) as being unpatentable over Science of Bread in light of Teff bv, Teff-Nutrition Data, Union

Mill and Eragrain Teff. In particular, the Office Action states that it would have been obvious to one of ordinary skill at the time of the invention to produce the inventions recited in claims 5-6, 13, 30-32 and 42-44 in view of the above cited references. Applicant respectfully traverses the rejection.

Regarding the above rejection, the Office Action fails to provide supporting evidence of obviousness as is required. "With regard to rejections under 35 U.S.C. § 103, the Examiner must provide evidence which as a whole shows that the legal determination sought to be provided (i.e., the referenced teachings establish a *prima facie* case of obviousness) is more probable than not." MPEP §2142 (emphasis added). In the present instance, the Office Action simply states that it would have been obvious to obtain the inventions recited in claims 5-6, 13, 30-32 and 42-44, which is merely the assertion sought to be proved. Regarding the rejection of claims 5 and 30, before a workable range can be characterized as the result of routine experimentation, the particular parameter *must be recognized* as a result-effective variable (emphasis added). *In re: Antonie*, 559 F.2d 618, 195 USPQ 6 (CCPA 1977); MPEP § 2144.05II(B). None of the cited references identify the relationship of the length of after-ripening for the disclosed application recited in claims 5

and 30. In addition, claims 5-6, 13, 30-32 and 42-44 depend upon claim 1, and should be allowable for the same reasons that claim 1 is allowable.

Moreover, regarding claims 30-32 and 42-44, the Office Action has not provided sufficient support to demonstrate that Science of Bread in light of Teff bv necessarily discloses the elements recited in the rejected claims. Science of Bread in light of Teff bv does not, therefore, explicitly or inherently disclose the elements recited in claims 30-32 and 42-44.

Accordingly, the rejection of claims 5-6, 13, 30-32 and 42-44 under 35 U.S.C. §103(a) is overcome, and Applicant respectfully requests that it be reconsidered and withdrawn.

The Office Action states that claims 19-23 are rejected under 35 U.S.C. §103(a) as being unpatentable over Kindie in light of Teff bv and Teff-Nutrition Data, and further in view of Zegeye. Applicant respectfully traverses the rejection.

As discussed in more detail above, Kindie in light of Teff bv and Teff-Nutrition Data does not explicitly or inherently teach or suggest all of the claim elements of claims 19-23. The disclosure by Zegeye does not cure the noted deficiencies of the above combination of references. Accordingly, claims 19-23 are

allowable over Kindie, Teff bv, Teff-Nutrition Data or Zegeye, taken alone or in proper combination.

The Office Action states that claims 25-26 are rejected under 35 U.S.C. §103(a) as being unpatentable over Lee et al. (US Pat. No. 3,843,827, "Lee") in view of Science of Bread in light of Teff bv. Applicant respectfully traverses the rejection.

As discussed above regarding the cited references of Science of Bread in light of Teff bv, the Office Action has not provided sufficient support to demonstrate that the references, either alone or in proper combination, necessarily disclose or suggest the elements recited in the rejected claims. Science of Bread in light of Teff bv does not, therefore, explicitly or inherently disclose, or even suggest, the elements recited in claims 25-26.

The disclosure by Lee does not cure the deficiencies noted above regarding Science of Bread in light of Teff bv. Accordingly, claims 25-26 are patentable over the disclosures of Lee, Science of Bread or Teff bv, taken alone or in proper combination.

The Office Action states that claim 28 is rejected under 35 U.S.C. §103(a) as being unpatentable over Slimak (US Pat. No. 4,911,943) in view of Science of Bread. In particular, the Office Action states that it would have been obvious to substitute the

flour of Slimak with that of the teff flour of Science of Bread to meet the limitations of claim 28. Applicant respectfully traverses the rejection.

The disclosure by Slimak is silent with respect to flour types other than amaranth and Quiona that can be used in pharmaceutical or cosmetic compositions. Accordingly, there is no disclosure or suggestion, or even motivation, for one of ordinary skill to combine the disclosures by Slimak and Science of Bread to arrive at the inventions recited in claim 28. In addition, claim 28 recites a method for binding a composition comprising mixing components with starch of a flour, rather than mixing directly with a flour, as apparently called for by Slimak. Therefore, claim 28 is patentable over Slimak or Science of Bread, taken alone or in proper combination.

The Office Action states that claims 33-35 are rejected under 35 U.S.C. §103(a) as being unpatentable over Science of Bread and further in view of Celiac Recipes in light of Approachable Nutrition. In particular, the Office Action states that it would have been obvious to modify the recipe of Science of Bread to include arrowroot powder in accordance with Approachable Nutrition. Applicant respectfully traverses the rejection.

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Claims 33-35 ultimately depend upon claim 1, and should be allowable for the same reasons as claim 1, and also because of the additional elements recited in claim 33-35. Applicant therefore submits that the rejection of claims 33-35 under 35 U.S.C. §103(a) over Science of Bread and further in view of Celiac Recipes in light of Approachable Nutrition, is overcome, and respectfully requests that it be reconsidered and withdrawn.

The Office Action states that claims 36-38 are rejected under 35 U.S.C. §103(a) as being unpatentable over Science of Bread in view of Celiac Recipes in light of Approachable Nutrition, and further in view of Kindie and Zegeye. In particular, the Office Action states that it would have been obvious to modify the composition of Science of Bread and Celiac Recipes to include the disclosures of Kindie or Zegeye. Applicant respectfully traverses the rejection.

Claims 36-38 ultimately depend upon claim 1, and should be allowable for the same reasons as claim 1, and also because of the additional elements recited in claim 36-38. Applicant therefore submits that the rejection of claims 36-38 under 35 U.S.C. §103(a) over Science of Bread in view of Celiac Recipes in light of Approachable Nutrition, and further in view of Kindie and Zegeye,

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is overcome, and respectfully requests that it be reconsidered and withdrawn.

CONCLUSION

New claims 45-74 are added to recite subject matter present in the original claims that applicant has a right to claim. Entry and consideration on the merits is respectfully requested.

In view of the above amendments and discussion, Applicant submits that the application is now in condition for allowance, and earnestly solicits notice to that effect. The Examiner is encouraged to telephone the undersigned attorney to discuss any matter that would expedite allowance of the present application.

Respectfully submitted,

Jans Roosjen

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By: /Charles L. Gagnebin iii/
Charles L. Gagnebin III
Registration No. 25,467
Attorney for Applicant(s)

WEINGARTEN, SCHURGIN,
GAGNEBIN & LEBOVICI LLP
Ten Post Office Square
Boston, MA 02109
Telephone: (617) 542-2290
Telecopier: (617) 451-0313

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